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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 663

ROBERT MOORE, RICHARD McCOARD, GEORGE SHERRAD AND JOE PIMENTEL,
Petitioners

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF CALIFORNIA AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL, THIRD DISTRICT, STATE OF CALIFORNIA.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioners herein named respectfully petition for a *writ of certiorari* to review a decision and judgment of the District Court of Appeal, Third Appellate District, of the State of California. (This is a companion case to that of *Bundte and Phillips* v. *California*, and involves identical problems, in which case an application for *writ of certiorari* is concurrently filed herewith and reference herein is made thereto.)

Statement of Case

The judgment here sought to be reviewed affirmed the Superior Court of Mendocino County which found the petitioners herein guilty of the crime of rioting as charged in a Mendocino County indictment in one count under Penal Code 404 of California,[1] and of assault with a deadly weapon under Penal Code 245.[2] The indictments, identical except for names, in the count of rioting and in each count of assault with deadly weapon read as follows:

(a) *The riot count:*

> "Robert Moore, Richard McCoard, George Sherrad and Joe Pimentel are accused by the Grand Jury of the County of Mendocino, State of California, by this indictment, found this 13th day of February, 1947, of the crime of misdemeanor, to wit, violation of Section 404 of the Penal Code, to wit, riot, committed as follows:
>
> "That said defendants, Robert Moore, Richard McCoard, George Sherrad and Joe Pimental, on the 4th day of February, 1947, in the said County of Mendocino, State of California, and before the finding of this indictment, acting together and without authority of law, did willfully and unlawfully, use force and violence disturbing the public peace and then and there

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[1] Penal Code of Calif. Sec. 404. "Riot" defined. Any use of force or violence, disturbing the public peace, or any threat to use, such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot.

[2] Penal Code of Calif. Sec. 245. Assault with deadly weapon: Punishment. Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment in the State prison not exceeding ten years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars, or by both such fine and imprisonment.

threatened to use force and violence, which said threats were accompanied by immediate power of execution" (R. 4).

(b) *The assault count:*

As and for a further, separate and distinct count and cause of action, being a different offense than the crime hereinabove set forth in Count One hereof, but connected in its commission therewith, said defendants, Robert Moore, Richard McCoard, George Sherrad and Joe Pimental are accused by the Grand Jury of the County of Mendocino, State of California, by this indictment found this 13th day of February, 1947, of the crime of felony, to wit, violation of Section 245 of the Penal Code, to wit, assault with a deadly weapon, committed as follows:

That said defendants, on the 4th day of February, 1947, in the said County of Mendocino, State of California, and before the finding of this indictment, did then and there, willfully and unlawfully and feloniously, assault one Wilbur Pullen, a human being, by means of force likely to produce great bodily injury, to wit, by throwing rocks at said Wilbur Pullen with great force and violence (R. 4).

Thus the rioting count charged that these petitioners "acted together unlawfully and willfully used force and violence in disturbing the public peace," etc. The felony counts 2 to 10 accused these petitioners in that they "willfully assaulted (certain individuals specifically named in each count) by means of force and violence likely to produce great bodily injury, to wit, *by throwing rocks.*" (Italics added)

Each felony count, therefore, charged each petitioner-defendant with the direct and personal commission of a *specific act* definitively particularized therein. The charge was not in the general all-inclusive language of the statute, thus presupposing its commission in any of the possible

statutory methods, but instead, the charge described with specific precision the particular act constitutive of the offense against which these petitioners would be called upon to defend.[3]

Pursuant to conviction under such counts, sentences were imposed by the trial court to run concurrently in the California State Penitentiary at San Quentin on the felony counts and in the County Jail of Mendocino County on the count of riot. (R. p. 606-617.)

Pursuant to California procedure, appeal was taken to the Supreme Court of that State and, by the Supreme Court under its constitutional power, referred to the District Court of Appeal, Third Appellate District, for decision (R. 17).[4]

The District Court of Appeal in its decision of September 28, 1948, affirmed the judgment of conviction below.[5] Thereupon, petitioners applied to that court for a rehearing, earnestly urging error in its decision, both as to its construction of local law and as to Penal Code 31, its interpretation and construction of which petitioners insisted collided squarely with the Federal Constitution (14th Amendment) (R. 624). Notwithstanding a revision of its judgment acknowledging that defendants had filed motions for separate trials, the District Court of Appeal nevertheless took no note of the Federal question so vigorously pressed

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[3] For a summary statement of the facts involving the subject matter of the trial below, reference is made to the brief in support of this petition appended hereto (p. 21, *infra*), and which, for the sake of brevity, will not be repeated here.

[4] Pursuant to the Constitution of California and California law, appeal was originally taken to the Supreme Court. That Court, for its convenience and expedience, may assign a cause for hearing to the District Court, reserving and retaining power to call the cause before it for hearing either before or after hearing in the District Court of Appeal, Const. of Calif., Art. VI. Pursuant thereto, for convenience and expedience, the Supreme Court of California assigned the cause to the District Court of Appeal, Third Appellate District.

[5] See supporting brief, subjoined hereto, for Opinion in full, p. 19, *infra*.

in appellants' petition and again affirmed judgment of conviction of the court below (R. 633).

Pursuant to the reservation of the power of review in the Supreme Court of California (Calif. Const., Art. VI, Sec. 4), appellants sought relief in that court, resting their appeal in large part upon their position that the construction extended to Penal Code 31 by the decision of the District Court of Appeal constituted a basic violation of fundamental due process (14th Amendment) (R. 634). The Supreme Court of California, however, with but one dissenting voice (that of Justice Carter) denied a hearing and review, thus affording to the decision of the District Court of Appeal a status of finality (R. 655).

Neither the District Court of Appeal nor the Supreme Court of California, therefore, undertook to adjudicate or pass upon the constitutionality of the California statute, Penal Code 31, as extended and construed by the California court.

California Judgments Here in Issue and Dates of Entry Thereof

The judgment of conviction by the Superior Court for Mendocino County was entered on June 27, 1947. The opinion of the District Court of Appeal issued from that court September 28, 1948, and is reported in 87 Adv. Cal. App. 846, 1024. Petition for rehearing was denied on October 13, 1948. The Supreme Court of California denied appellants' petition for hearing therein October 25, 1948, thus affording to the decision of the District Court of Appeal a status of finality.[6]

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[6] Though the federal question arising under the Constitution of the United States, 14th Amendment, was urged upon the District Court of Appeal and argued, that court took no note of the problem in its decision. Though the federal question was similarly urged upon the Supreme Court of California in petitioner-appellants' brief, that court likewise declined to pass upon the question.

Statement of Jurisdiction

Jurisdiction to review this cause (and the companion case of *Bundte and Phillips* v. *California*) is rested upon the statutes of the United States, 28 U.S.C. 344(b), now codified as New Judicial Code 1948, 28 U. S. C. 1257; 28 U. S. C. 2101(c), and Rule 38½, Supreme Court, November 15, 1948.

There is here drawn in question the validity of a statute of California, the *operation whereof as construed in the decision* is repugnant to due process and to the Constitution of the United States (14th Amendment). It is not the validity of the statute, *per se*, but rather the particular construction and extension thereof by the California court below which is questioned. To employ it, as does the California court, in such a manner as to permit conviction of these defendants of specific acts definitely charged in the indictment, not by proof that they personally committed them, but by proof that such acts were committed by others present, is challenged as violative of due process. Petitioners are thereby deprived of freedom of assembly and of the right of peaceful picketing. In so far as criminal acts of others are *vicariously* imputed to them, they are again deprived of due process. To give to the California statute in question the reach and effect extended to it by the California court in the instant decision is to strip these defendants of their constitutional presumption of innocence. They are compelled, contrary to the 6th Amendment of the Constitution, to stand trial for an offense the nature of which was not described in the indictment and as to which they have not been informed.

Petitioners earnestly urge that the action of the State of California, as authorized and sanctioned by the decision here in issue, constitutes a denial of due process guaranteed by the 14th Amendment to the Constitution of the United States and spelled out particularly in the 1st, 5th and 6th Amend-

ments thereto. It is the position of petitioners that they were convicted in the state courts for acts alleged to be offenses by the laws of California, with which they were not charged and of which they were not accused in an indictment; that furthermore, they were convicted for acts which they did not commit but which, under the evidence, were committed, if at all, by other parties; and finally, that they were denied their fundamental right to the presumption of innocence and their right of peaceful picketing and free assembly vouchsafed them under the 14th Amendment, in that their lawful right to be present on a picket line was converted into *prima facie* evidence, or into a conclusive presumption, of incrimination for such acts of violence as may have been committed by others then present.

The problem here sought to be raised involves California Penal Code Section 31 which, in common with many similar statutes throughout the United States and with an analogous act of Congress, U. S. C. Sections 550 to 557, renders aiders and abettors guilty as principals. Petitioners do not challenge the constitutionality of that statute *per se*, nor when applied to a proper case. This Court has never, however, we submit, passed upon the precise issue which we here present.[7] In the instant case, had the indictment charged the act for which defendants were to stand trial with that specificity found in the *Moy* indictment, there would here be no complaint. It is the unwarranted and unprecedented extension of Penal Code 31, wrenching it out of its context, which renders it a vehicle for charging a specific crime on the one hand, and on the other basing a verdict of conviction upon proof that the acts charged were actually committed by others, not these defendants. Thus the

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[7] A similar statute (28 U.S.C. 550-557) was before this Court in *Jin Fuey Moy* v. *U. S.*, 254 U. S. 189, but there is a wholly different aspect of the problem there involved.

statute is employed in all respects as a substitute for conspiracy, *while dispensing with the proof of the antecedent conditions necessary to make out conspiracy.*

It is now familiar law that the 1st Amendment, through the medium of the 14th, protects the rights guaranteed therein against state action or infringement. It is unnecessary to rely upon a similar premise so far as the 5th and 6th Amendments are concerned, for petitioners predicate their right to a vindication of the guarantees thereof upon the principle that those rights constitute a basic criterion of fairness fundamental to and essential in all criminal trials within the protection of the due process clause of the 14th Amendment.

Cases Illustrative of a Denial of Due Process, Deemed Applicable and Controlling Here

Cole v. *Arkansas,* 333 U. S. 196, 68 S. Ct. 514;

Kotteakos v. *United States,* 328 U. S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557;

Moore v. *Dempsey,* 261 U. S. 86, 43 S. Ct. 265;

Townsend v. *Burke* (June 14, 1948) 334 U. S. 736, 92 L. Ed. 1231;

Brown v. *Mississippi,* 297 U. S. 278, 80 L. Ed. 682;

Chambers v. *Florida,* 309 U. S. 227, 84 L. Ed. 716.

Cases Condemning State Action Creating a Prima Facie Presumption of Guilt as an Invasion of the Presumption of Innocence.

Morrison v. *California,* 291 U. S. 94, 78 L. Ed. 672;

Bailey v. *Alabama,* 219 U. S. 219, 55 L. Ed. 191;

Manley v. *Georgia,* 279 P. S. 1;

M. G. & K. C. R. R. Co. v. *Turnipseed,* 219 U. S. 35, 31 S. Ct. 136.

Stage at Which and Manner in Which Federal Question of Due Process Was Raised

At every opportunity, defendants vigorously objected to evidence of the acts of other parties. Such evidence the trial court received under its supposition that, although the defendants were individually charged with committing certain specfic acts, they might be convicted nevertheless under California Penal Code, Section 31, by proof that these particular acts were committed by others then present.

In their brief in support of their appeal to the District Court of Appeal, petitioners urged upon the District Court the decision of the Supreme Court of the United States in *Cole* v. *Arkansas* (decided March 1948), 332 U. S. 834, 68 S. Ct. 514, and insisted that that decision in principle as applied here controlled to render convictions in this case violative of fundamental due process. Upon the hearing before the District Court of Appeal, the issue with respect to due process and the 14th Amendment was extensively argued to the court both by counsel for tne appellants and respondents (R. 656, 661, 665, 670 *et seq.*). Due process, as defined in *Cole* v. *Arkansas,* and the constitutional right of peaceful picketing and free assembly were likewise strongly urged upon the Supreme Court of California in petitioners' brief. Criticizing the construction extended to Penal Code 31 by the trial court and by the District Court of Appeal as resulting in founding a conviction, not upon direct proof of the commission of the crime particularly as charged, but upon proof resting upon mere presence on the picket line at the time in question, petitioners, in appellants' Opening Brief to the District Court of Appeal, stated the issues as follows:

> "It is grave and serious error, incalculably prejudicial for the court below by an instruction based on Penal Code, Sec. 31, to permit the jury to hold defendants guilty *vicariously* by reason of the *acts of*

others instead of requiring guilt to be predicated only upon proof, if any, by the people of guilt based strictly upon *acts of their own.*" Appellants' Opening Brief, p. 38.

Petitioners in their Closing Brief to the District Court of Appeal likewise stated their position to the Supreme Court as follows:

> "• • • defendants had a perfect right to be where they were at the particular time that the alleged offenses took place • • • They were members of a labor union on strike • • • and were operating a picket line • • • on the morning of February 4th. Their position on the roadway outside the sawmill was protected by the 1st and 14th Amendments of the Federal Constitution. Their mere presence on the roadway at the time these alleged offenses took place • • • could not place them in jeopardy of the application of Penal Code Section 31 • • • the mere act of having a third party throw a rock at one of the complaining witnesses could not evidence a conspiracy between these four defendants here involved." Appellants' Reply Brief, pp. 4, 5.

The federal question was again urged in the petition for a hearing by the Supreme Court of California. In that petition the question argued was "whether rocks and photographs admittedly thrown by persons not defendants may be admitted in evidence against these defendants." Therein appellants complained of the grievous error of admitting into evidence two rocks (Exhibits 15 and 30) identified by prosecuting witnesses as having been thrown by none of these defendants and as having been introduced in an earlier trial for the purpose of establishing the guilt of other defendants not parties to this instant proceeding. (Appellants' Petition for Hearing by the Supreme Court (R. 634, 648-651).

Appellants' next point in their petition to the Supreme Court of California was "whether the constitutional right of peaceable assemblage may be stripped from the defendants in absence of an illegal act on their part." Under that heading appellants below urged decisions of the Supreme Court of the United States, including *Cafeteria Employees* v. *Angelos*, 320 U. S. 293, *Milkwagon Drivers* v. *Meadowmoor Dairies*, 312 U. S. 287, and *Herndon* v. *Lowery*, 301 U. S. 242. Specifically, appellants in their petition said:

> "The theory of the prosecution was that Moore could be convicted because rocks were thrown not so much by Moore but rather by other men in the picket line and this, without any charge of conspiracy between Moore and any other individuals. • • • that if Moore threw no rocks at all, or threw no rocks at particular individuals referred to in specific counts, he could still be convicted of throwing rocks at the individuals in question if the proof showed that someone else threw rocks at these persons. Moore and each of the other defendants in this and the companion case, *The People* v. *Bundte and Phillips*, were entitled to be judged on the evidence against them.
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> • • • • • • •
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> "Petitioners most earnestly urge upon this Court the necessity of granting a hearing of this case in order that important questions of law may be settled and that these petitioners may have due process of law." Appellant's Petition for Hearing by the Supreme Court, pp. 28, 29, 30, 31 (R. 651-655).

Nor did we fail to raise this problem in its essence in the trial court. The long record of the trial is replete with our objections to testimony of the acts and conversations of others, admitted by the trial court upon the assumption that they were competent to prove the guilt of these defendants. Rocks not alleged or proven to have been thrown by these

defendants were admitted over the objection of these defendants. The record discloses a vigorous and straightforward statement of the grounds of our objections. While our objections do not by formal terminology refer to the 14th Amendment of the Constitution of the United States by name, they do nevertheless necessarily implicate and urge the very substance and essence of due process guaranteed by that amendment. Our objections inherently raised the problem of a fair trial, of a fair day in court, of a fair opportunity to meet the particular charge levelled against the defendants in the indictment, all of which obviously and apparently go right to the heart of the question of due process.

Illustrative of our multiple objections to the testimony of this character, we select one or two typical exhibits from the trial record. Defendants below alertly and vigorously objected, not only to testimony and exhibits showing acts constituting assault by parties present other than these defendants, but made a specific objection to the admission into evidence of two particular exhibits. These were two rocks; one alleged by the witness May to have been thrown by a person not a defendant in this trial, which was admittedly a rock offered in exhibit in an earlier trial of different defendants for the purpose of proving the guilt of the defendants in that case. The record discloses our objections on various grounds, including, amongst others, the following:

> "Mr. Flood: We object, your Honor, to the admission on the grounds it is incompetent, irrelevant and immaterial and not connected with any issue in this case. It is not relevant to any issue in this case and not relevant to any count in the indictment. It is not identified with nor related to any defendant and the vice in the offer is apparent from the fact that it was offered and identified in other proceedings the pur-

pose of which was to show that it was thrown by someone else—by other parties not a party to this case. Certainly the same rock can't be used again.

"The Court: Overruled. It will be received as People's Exhibit Number 4 in evidence.

(Received in evidence as People's Exhibit 4.)

"The Court: The District Attorney has to prove his corpus delecti before he can tie up anyone with it.

"Mr. Flood: Now, your Honor, I have a very earnest opinion about this matter and I don't want to argue any more than your Honor wishes to hear argument, but I think we have a difference of views on this matter. I don't believe that an exhibit of that kind is admissible until it is properly established to be competent and relevant and material, and the exhibiting of a rock of that sort to a jury isn't cured by any motion to strike, because the harm has been done and the damage is incurable.

"The Court: I think the rock is admissible at this time. It has been so received.

"Mr. Busch: At this time, if your Honor please, I ask permission to exhibit it to the jury.

"The Court: You may" (R. 42-43).

The other involved similarly a rock introduced in an earlier trial against different defendants for the purpose of proving the guilt in that case. Our objection thereto was as follows:

"Mr. Flood: Objected to, your Honor, as incompetent, irrelevant and immaterial as to defendant Moore, defendant McCoard, defendant Pimentel, and defendant Sherrard.

"It is the same rock which you identified in your testimony in the case against Bundte and Phillips, is it not?"

(Witness answered "Yes, it is." Objection continued).

"Mr. Flood: Each defendant in this case is responsible for acts only if any committed by him. Clearly

as to Counts 2 to 10 there seems not the slightest ground for admissibility, . . . It may be argued that they are admissible under the Count of riot. As to the count of riot, these defendants are not liable for the acts of others. The objection I made this morning as to a similar exhibit represents my view on that matter. I don't think I need argue it any more. But I make exactly the same objection here, and on the same grounds as presented to the Court this morning.

"The Court: Well, I will not comment except to say that your objection is overruled" (R. 183).

On the conclusion of the prosecution's case defendants moved for an advisory verdict of acquittal (that is, for dismissal) as to certain defendants in certain specified counts in that the evidence of the prosecution failed to show that they had thrown any rocks whatsoever or had committed any acts of assault. The motion, with full particularization as to each defendant and the lack of evidence thereto, appears in the transcript (R. 227). Thereupon the District Attorney confessed in open court the absence of evidence with respect to the counts enumerated in defendants' motion.

"Mr. Busch: Yes. In regard to the motion made by counsel . . . I believe that the motion is good" (R. 237).

"Mr. Busch: I think probably the motion is good then in regard to Mr. McCoard as to count four, your Honor.

"With regard to count two, and Wilber Pullen, I don't find any testimony that Mr. McCoard and Mr. Pimentel threw at Mr. Pullen. I believe in regard to that count that the motion would be good as to those two defendants" (R. 238, 239).

The court, however, upon its own motion, taking note of the District Attorney's confession with respect to defendants' objections, nevertheless overruled them and in doing

so disclosed the theory which gave rise to the evil of which we throughout have complained. The court said:

> "Mr. District Attorney, I note that your confession there that probably the motion for an advisory verdict is good in regard to two or three of these men, how can you reconcile that with your later argument that they were all together, all there pursuant to plan and concert and were all there?
>
> "Now, if that is the fact of the matter, doesn't Section 31 apply to all these defendants as far as every count is concerned alleging assault? . . . Isn't that a matter the jury should decide and not the Court? They have a right to draw their inferences from the testimony, and wouldn't that be an inference under section 31 that they are all principals?" (R. 239).

Defendants, renewing their objection to this line of reasoning, at a later stage urged upon the court:

> "It might very well be, for example, that twenty-five or thirty pickets went out there to accomplish their legitimate right of picketing. Something occurred where one or a half dozen or ten or twelve of those pickets by their own sporadic conduct suddenly broke out into an act of violence. That would not deprive those who were there on a lawful mission and pursuing a legitimate right, of their right to continue to pursue their legitimate right, regardless of the wrong committed by others, because the enterprise in its inception was legitimate and innocent of any unlawful intent.
>
> "However, if the rule which your Honor suggests were to be enforced, those who went up there for innocent purposes would be at the mere hazard of someone who unlawfully converts an innocent enterprise into an unlawful one.
>
> "Any picket on that line who did not throw a rock, could not in my judgment immediately be, by mere artifice of pleadings, converted into a criminal. And the fact on which criminality is alleged to rest must

be a fact of which he is apprised, and has the right to come into court and prepare his defense" (R. 241-242).

The substance of the constitutional problem here involved was, we submit, admittedly within the requisites of the controlling holdings of this court:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the U. S. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented. (citing cases) *Bryant* v. *Zimmerman,* 278 U. S. 63, 93 L. Ed. 194."

See also,

Murray v. *Charleston,* 96 U. S. 432, 24 S. Ct. 760,

and,

Carter v. *Illinois,* 329 U. S. 173:

> "A state must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan,* 294 U. S. 103. Questions of fundamental justice protected by the Due Process clause may be raised to use lawyer's language, *dehors* the record."

Constitutional Question Presented

Is it not a violation of substantive due process guaranteed by the 14th Amendment:

1. To charge these defendants not in the general language of the statute but with having personally committed a

specific offense definitively described, but permitting the jury to convict on proof that such offense was not personally committed by them but by others then present?

2. To subject defendants' right to engage in peaceful picketing and free assembly to an onus and incubus so as to render defendants constructively culpable for violence, if any, on the part of others present on the picket line?

3. Is mere presence on the picket line, which itself is lawful, to be construed by the artifice of Penal Code 31 as *prima facie* evidence, or a conclusive inference, of guilt of aiding and abetting other parties present? Does not such *prima facie* evidence of guilt by association strip these defendants of their presumption of innocence with which due process clothes them?

Reasons for Allowance of the Writ

Review of the constitutional issue which we here present deserves, we respectfully submit, the consideration and attention of this Honorable Court. The question does not relate to a mere private matter. In essence, it presents a major problem of great public concern and it calls upon this Court to mark by clear delineation the limits beyond which state action may not reach in encroaching upon the liberties of the 1st, 5th and 6th Amendments, which have been recognized to embrace the fundamental elements of due process guaranteed by the 14th Amendment. The principle of protection against mass convictions, and the necessity for preserving individual presumption of innocence throughout, is here presented. The basic principle that each citizen is liable for his own acts, but not responsible for the acts of others, is here at stake. In the light of these considerations, we respectfully submit, therefore, that the problem here involved is one of substantial importance, the solution of which is essential to administra-

tion of criminal justice in conformity with concepts of constitutional liberty and due process.

Conclusion

For the reasons herein stated, petitioners pray that this Honorable Court issue a Writ of Certiorari to the District Court of Appeal, Third Appellate District, State of California, to the end that the question involved may be fully presented and justice done in the premises.

Dated, San Francisco, California, March 18, 1949.

Respectfully submitted,

GEORGE E. FLOOD.

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Of Counsel.

Certificate of Counsel

I hereby certify that I am the attorney for the petitioners in the above entitled case, and that in my judgment the foregoing petition is well founded in law and fact, and that said petition is not interposed for delay.

Dated, San Francisco, California, March 18, 1949.

GEORGE E. FLOOD,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 663

ROBERT MOORE, RICHARD McCOARD, GEORGE SHERRAD AND JOE PIMENTEL,

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vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the State Court

The opinion of the District Court of Appeal for the Third Appellate District of the State of California, constituting the final decision and judgment of the highest state court which may be had in this cause, filed October 28, 1948 (87 Adv. Cal. App. 846, 1024) is printed herein in the appendix subjoined hereto, page 44, *infra* (R. 618).

The opinion is confined entirely to a consideration and discussion of local law, and little note therefore need be taken of it here since it is not germane to the constitutional issues we here seek to present, except to comment upon certain important considerations which, in our judgment, the

court in its decision disregarded. Both in the briefs prior to the hearing and extensively in argument upon the hearing, as well as in petitions for rehearing (and in the petition and brief for review by the Supreme Court of the State of California), petitioners urged the force and controlling applicability of the decision of the Supreme Court of the United States then just recently published in *Cole* v. *Arkansas* (March 8, 1948) 333 U. S. 196. The District Court, however, in its decision devoted no consideration whatsoever to the principles of that case. It rejected petitioners' exceptions to the admission of testimony, photographs and rocks into evidence which were not identified as to any of these defendants.

The trial court, as we conceived it, failed to recognize that evidence of the acts of others, thus received under the supposed sanction of California Penal Code Section 31, had the effect of utterly destroying the value of defendants' evidence, cogently if not conclusively negativing personal participation in the acts charged in the indictment. The jury was authorized thereby to return a verdict of guilty upon the mere basis of testimony that the acts were committed by others—unnamed and anonymous—there present. Thus, guilt of third parties, not charged, was vicariously imputed to these defendants. And why? Because these defendants in association with others were present as pickets at the time such acts occurred.

Petitioners clearly pointed out, both in briefs and argument, that the statute, as thus judicially construed and applied to the specific acts charged in the indictment, and when extended and applied to incriminate these defendants for the acts of one or more of thirty or forty pickets lawfully assembled for picketing purposes, served to permit and authorize the jury to convict these defendants of a crime in the nature of a conspiracy other than and different from

the offense and acts charged. And conviction was founded upon proof, not of their own acts, but of acts of others; or again, in ultimate analysis, upon proof, not that they committed the acts thus specifically charged, but merely that they were present at the time when and the place where those acts, though perpetrated by others, were committed.

Jurisdiction

The jurisdiction of this Court is invoked (as is more particularly set forth in the petition herein, pp. 6-8, *supra*) under the provisions of the statutes of the United States, 28 U. S. C. A., Sec. 344(b), as codified, New Judicial Code, 28 U. S. C. 1257; 28 U. S. C. 2101(3); cf. Rule 38½, Supreme Court, November 15, 1948.

> An appeal taken, or petition for writ of certiorari filed, seeking review of a judgment of a state court of last resort in a criminal case, shall be taken or filed within the *ninety* days prescribed in 28 United States Code Annotated, section 2101(c), approved June 25, 1948.
>
> So far as applicable, the general considerations and provisions of Rules 36 and 38 will control in respect to an appeal taken or petition for writ of certiorari filed in a criminal case from a state court of last resort. New Rule 38½, S. Ct. of the U. S.

In the petition for writ filed herein, petitioners have set forth in detail a statement of the particular grounds on which jurisdiction of this Court is invoked. Reference thereto is herein made (pp. 6-8, *supra*) and such grounds, without repetition here, are herein incorporated.

Statement of the Case

This case and its companion case, *People* v. *Bundte and Phillips*, consolidated with it for hearing before the Dis-

trict Court of Appeal for California, is the by-product of the longest strike in the history of northern California. It grew out of a long course of picketing of certain redwood lumber operations in the northern counties of that State, and it represents the final chapter in that economic struggle which now happily has been completely and amicably adjusted so that the critical products of the redwood lumber industry are now again flowing normally in the channels of trade.

These defendants were members of the Lumber and Sawmill Workers Union, affiliated with the United Brotherhood of Carpenters and Joiners of America, A. F. of L. That union had been on strike for more than a year, and through the entire period had engaged in the peaceful picketing of a large number of operators throughout the redwood area. The picketing throughout had been of an orderly nature. These issues grew out of the only two instances of violence occurring during that long and bitterly contested strike. These defendants served regularly upon the picket line throughout its course without complaint or incident. Among some forty-odd pickets present on the two occasions here in issue, these defendants found themselves singled out for a major prosecution and subjected to penitentiary sentences for a variety of acts occurring at the times and places here in issue, committed for the most part by any one or more of the forty present. Proof, however, as we have throughout earnestly contended, that these particular defendants committed any particular act, is wholly lacking. Their conviction, therefore, as we conceive it, rests *ultimately* upon the fact that they were present with others of the group of forty when some of these acts occurred. Under the instruction of the court, based upon the application—unwarranted, as these defendants contend—of Penal Code 31 of the Statutes of California (R. 516-17), the jury

was permitted to convict these defendants without the necessity of requiring proof that they committed any particular act constituting the subject matter of any particular count. It is with the philosophy of such a conviction that we have respectfully, throughout these proceedings, taken issue.

At the trial, among the facts which appeared are the following:

Some thirty or more pickets gathered at the Richardson Mill on the morning of February 4; some fifteen or twenty were standing near the east entrance to the mill, and ten or fifteen near the west entrance, 500 feet from the first group (R. p. 75). Four of the nine complaining witnesses entered directly by the east entrance, and the remaining five passed the east and entered by the west road. Eight of the nine individuals in the alleged assault were non-union employees, and the ninth, Kenneth Jackson (Count 5 of the indictment), did not even appear or testify either before the grand jury or at the trial. Four of the eight did not identify any of these defendants as having committed any assaults whatsoever (R. 49, 106, 125, 126, 137). Complaining witness Schwartz did not see any defendant commit any alleged assault against any person other than himself named in the indictment, and as to his own entry, did not accuse either defendants Sherrad or Pimentel (R. 54, 70-75). Complaining witness Wise did not accuse Pimentel or McCoard (R. 93). Complaining witness Ray did not accuse defendants Pimentel, McCoard or Sherrad as to his own entry into the mill (R. 158, exh. 30).

Shortly after the acts here complained of occurred, the Chief of Police of Willits arrived and talked with the mill workers and complaining witnesses, inviting them to identify, if they could, any of the pickets who had thrown rocks at them. None of them, however, was able to do so, and the

Chief of Police was unable to make any arrests (R. 279-282). Likewise, an hour later the State Traffic Officer appeared and offered to arrest any picket identified as having thrown rocks, but none of these complaining witnesses was able to do so and no arrests were made (R. 280-290).[8-9]

Throughout the trial the court admitted into evidence acts of others present on the picket line, constituting assaults against the prosecuting witnesses named in the indictment. The court admitted exhibits consisting of rocks thrown by other parties without any attempt to identify them as having been thrown by these defendants (R. 130-132, 183-184; exhs. 15 and 30), and the court admitted photographs evidencing assaults by other parties, not defendants, upon the cars of prosecuting witnesses, in support of the indictment charging assaults by these defendants. All such evidence was admitted over the objections of these petitioners.[10] The court justified the ad-

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[8-9] Upon the trial, however, witnesses Gibson and Ray in their testimony made certain identifications, although the testimony of one was contradictory to that of the other. Their entire testimony, we submit, was objectively demonstrated as physically impossible of credence—first, because they were stationed some 600 feet away from the events they purported to observe; secondly, their line of vision was obstructed by intervening lumber piles; and thirdly, the morning was foggy and subject to poor visibility (R.T. pp. 71, 416). No matter, however, how conclusively or convincingly their testimony was impugned in the minds of the jurors, the jury was, by the court's view of P.C. 31, authorized to convict, nevertheless, upon the mere fact of the defendants' presence at the time and place in question.

[10] Illustrative of our objection, see: R. 255, where the court, over objection, permitted testimony with respect to an anonymous statement made by some unidentified member in a crowd to stand as evidence against these defendants; R. 41-42, where a rock, Exh. 4, was admitted although not identified with or to any of these defendants; R. 82, the same with respect to Exh. 10; R. 81, the same with respect to Exh. 9; R. 123, the same with respect to Exh. 14; R. 124, again an anonymous statement; R. 129-130, Exh. 15, consisting of a rock admittedly not thrown by these defendants, which had been received in evidence in the earlier trial of *People* v. *Bundte and Phillips* in support of the indictment

mission of such extraneous evidence solely upon the basis of P. C. 31. The court itself acknowledged the lack of affirmative testimony to established guilt under certain counts (R. 254-256). The court, however, conditioned the admission solely upon the basis of P. C. 31 (R. 235, 240, 252-253). It was the court's view that there was proof that one or more of thirty or forty pickets then present committed acts of violence, that these four defendants were present among them and that necessarily, by virtue of their presence alone, they were guilty of aiding and abetting. Other than the mere fact of their presence, *nowhere is there any substantial evidence of any single act on the part of these defendants amounting to aiding, abetting, inciting or encouraging.*

Specifications of Error Herein Urged

The district court, in its decision and judgment, erred in sustaining the conviction herein in that the trial and conviction of these defendants violated constitutional due process guaranteed by the Fourteenth Amendment on the following grounds and in the following particulars:

1. Defendants' constitutional right to peaceful picketing and free assembly was jeopardized by the fact and to the extent that they were held constructively culpable for acts of violence, if any, by others present with them on the picket line. (For argument, see *infra*, pp. 26-32.)

2. Defendants were charged, not in the general language of the statute with violating California Penal Code, Sec. 245, but specifically with having committed an assault by throwing a rock at certain named persons. They were convicted, however, upon evidence that these acts were committed,

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therein; R. 130-132, another exhibit of identical nature with Exh. 15. Our objection to this line of testimony appears at frequent intervals throughout the record, but is comprehensively set forth R. 247-252.

not by them, but by others then present. For argument, see *infra*, pp. 32-38.)

3. The defendants were deprived of their imprescriptible right to a presumption of innocence. In the manner in which the trial court applied and construed California Penal Code 31, their mere presence on the picket line at the time when someone—in many cases anonymous and unnamed—threw rocks, was rendered *prima facie* if not conclusive evidence of their guilt and of criminal responsibility for whatever rocks may have been thrown by others present. (For argument, see *infra*, pp. 38-41.)

ARGUMENT

1. Decision Below Violates Fourteenth and First Amendments by Assuming Guilt of ANY or ALL Present on Picket Line for Acts of Violence Committed by SOME Only.

The California Court by its decision has, we submit, entirely over-simplified the scope and effect of Penal Code 31 as applied to the factual context existing in the instant case. It has taken the dictum of this statute to mean that, where assaults occur in the course of picketing otherwise lawful, any member of the picket line may be charged specifically with committing such an assault and guilt may be proved alternately either by evidence of having personally committed the act of assault as charged or, in the event of failure of such proof, merely by showing that he was present on the picket line when such assault was committed. Thus the decision *assumes* that these defendants, present as they were on the picket line when violence broke out, were chargeable with the acts of all of the thirty or forty pickets present with them. The prosecution charged each defendant *personally* and *directly* with committing the act of *throwing*

a rock at each of certain named prosecuting witnesses. Its proof, however, was not limited to showing the particular fact thus definitely charged. It sought to prove the guilt of these defendants of the particular act charged in the indictment by an immense volume of testimony that others, not these defendants, threw the rocks described in the indictment. Such proof was admitted by the trial court under the supposition that it was authorized by P. C. 31, and, by instructing the jury under the terms of P. C. 31, the jury was authorized to base a verdict of conviction upon such proof.

Implicit in the prosecution's case was the *assumption* that picketing throughout was unlawful. There was no attempt to prove, however, that the picketing was unlawful. The prosecution in the trial court indulged in a further *assumption.* It was *assumed*—no proof thereof was offered and none in the record exists—that all of the thirty or forty pickets there assembled were present for an unlawful purpose, scheme or plan—that is, that they had precedently conspired to assemble for the unlawful purpose of committing violence. This was a wholly gratuitous assumption on the part of the prosecution and the court. It was neither charged nor proved, nor was there any attempt to prove it, yet it colored the thinking of the trial court and conditioned the court's admission of the evidence complained of. It was evidence so received which permitted the jury, under an instruction premised upon the supposed scope of P. C. 31, to convict, even though the evidence failed beyond reasonable doubt to establish a personal commission of the acts charged in the indictment. Proof of personal guilt was unnecessary, so long as the fact of defendants' presence on the picket line was established. The trial court's theory and its instruction predicated on P. C. 31 rendered these

defendants, if present, responsible for the acts of any and all others then present.

It is manifest that the trial proceeded by virtue of the trial court's view of P. C. 31 in every respect and particular as though the defendants had been charged with a conspiracy *to assemble unlawfully* with thirty or forty others on the picket line and to engage with thirty of forty other pickets in acts of violence. This assumed premise was likewise adopted in its decision by the District Court of Appeal. Defendants were held, not for their own acts, but for those of every one of the thirty or forty present. Had they been charged under the law of conspiracy, it might be said that they could be held legally accountable for the acts of others, but no conspiracy whatsoever was charged. The specific acts of assault were so definitely described as to put in issue only one thing: Were these defendants guilty, or were they not, of throwing the *particular rocks* at the *particular persons* named in the indictment? No unlawful concert between pickets was pleaded, nor was it proved; it was merely *assumed*. Having thus assumed an initially illegal assembly of pickets, it was comparatively easy for the prosecution to proceed to the next assumption: Given an *assumed* illegality in the assembly of pickets, mere presence on the picket line denoted "aiding, abetting, encouraging and inciting", hence invoking P. C. 31 rendering abettors guilty as principals. This assumption operated to render the defendants guilty automatically as to each count specifically charging assault in the indictment. Thus it dispensed with the necessity of substantive proof of acts constituting the ingredients of each count thus charged. Presence on the picket line constituted *prima facie* if not conclusive evidence of guilt without the necessity of producing formal proof. It was not necessary to prove that the defendant threw a rock at any

named prosecuting witness. It was enough if he were present when such a rock was thrown. No matter how conclusively or convincingly each defendant might disprove any personal participation whatsoever on his part in the violence and in the affray,[11] he was trapped *ipso facto* by the fact that he was present on the picket line. Given the fact of presence, the fact of picketing, he was stripped of all defense. He was liable for the acts of all then present. He was shorn of any benefit of the presumption of innocence. He was automatically guilty. What we have said applies with equal force to each and all of the thirty or forty pickets then present. Had the prosecution so elected, it might have convicted any one of them upon precisely the same evidence relied upon here to convict these defendants, without any undertaking on its part to prove that any of them threw any particular rocks or assaulted any given individual.

Let us note the devastating effect upon the constitutional right of peaceful picketing. Under such a rule of law, pickets are present on the picket line only at the risk that some one or more of the pickets assembled shall not, upon his own or their own responsibility, spontaneously or sporadically, under the excitement of the moment, indulge or engage in some act of violence. Thus the plenary free-

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[11] Defendants effectively and objectively disproved the remote and obscure evidence by which the prosecuting witnesses sought to identify defendants. But for P.C. 31, its conclusiveness, we submit, would have prevailed in their favor. The evidence established that, at the time the violence was alleged to occur, prosecuting witnesses were unable to identify these defendants to the local municipal police, or to the state patrol (R. pp. 281-82; 288); and that the asserted identification at time of trial, three months later, was objectively impossible, by reason of distance, fog and intervening lumber piles, obscuring and obstructing their line of vision. This evidence, however, lost value in virtue of the court's instruction under P.C. 31, which told the jury it might convict defendants upon proof of their mere presence, as aiders and abetters, though they committed no act of violence.

dom of peaceful picketing and free assembly guaranteed by the First Amendment of the Constitution becomes but a conditional freedom—a freedom subject to a *condition subsequent*. Should a spontaneous or individual act of violence occur on the picket line, the lawfulness of assembly on the part of all present then ceases, irrespective of personal participation therein. Under such a theory, the acts of each then present are automatically imputable to all.

That this was the theory upon which the prosecution and the court, during the trial herein, proceeded appears clearly from the brief of the Attorney General. There it was said (pp. 16-20):

> "There emerged from the one criminal transaction two groups of principals, (1) the defendants herein and (2) those not defendants herein. Each member of each group by virtue of his being a principal aided and abetted each other member of both groups. Because of that fact each of these defendants stands accused and convicted in the dual role of principal as to himself and accessory to every other principal.
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> "Joint participation with those engaged in the commission of a wrongful act is strong evidence of aid and assistance.
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> "The standing shoulder to shoulder one with the other in active armed attacks upon the complainant witnesses in this matter is certainly evidence of effective encouragement and assistance.
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> • • • • • • •
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> "It has also been held that the fact that a person is present at the commencement of an assault without disapproving or opposing it, is evidence on which, in connection with other circumstances, it is competent for the jury to infer that he aided and abetted the act.[12]

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[12] We are mindful that the prosecution coupled certain evidence undertaking to prove that these or some of these defendants threw rocks with the application of P.C. 31. Hence, it argued that since there was some evidence that defendants threw certain rocks, it was sufficient to convict

We submit, therefore, that the right of peaceful picketing and free assembly, protected by the First and Fourteenth Amendments, can not thus be made the vehicle for imputing to the defendants criminal liability for the acts of others. The right of peaceful picketing, guaranteed under the First Amendment, has been so vindicated by decisions of this court that authority therefor scarcely need be cited. We limit ourselves to the leading cases of *A. F. of L.* v. *Swing* (312 U. S. 312) and *Thornhill* v. *Alabama* (310 U. S. 88), defining the constitutional character of the right of peaceful picketing and free assembly. We advert, likewise, to the case of *Milk Wagon Drivers* v. *Meadowmoor Dairies* (312 U. S. 287, 61 S. Ct. 552, 85 L. Ed. 836, 132 A. L. R. 1200), in which only sporadic acts of violence were specifically contained. The general right of others not participating therein to pursue their constitutional guarantee of peaceful picketing was not disturbed nor was any criminality for the acts of violence visited upon pickets not participating therein.

We think it germane in just a word or so to refer, by way of analogy, to the decisions of this court in recent years construing religious freedom which, correlatively with freedom of speech and assembly, is guaranteed by the First Amendment in a notable series of some twenty or more cases frequently identified as *Jehovah Witnesses* decisions.[13] In

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them on all of the multifarious counts by an instruction which told the jury that in throwing certain rocks the defendants were responsible legally for every rock thrown by everyone. We submit, however, that this distinction is too artful to be realistic. We have elsewhere herein pointed out that cogent proof disproving the state's evidence as physically incredible was offered to show that these defendants did not participate in the throwing of rocks. Such evidence, under the court's instruction based upon P.C. 31, lost all value since conviction, in final analysis, could rest upon the fact that the defendants were present at a time when rocks were thrown.

[13] These cases no doubt are so familiar as to render citation thereof unnecessary. In this connection, however, two cases are of special signifi-

those cases, this court has recognized that the freedom guaranteed in the First Amendment stands highest in the hierarchy of constitutional guarantees and is subject to infringement by state action only upon the most stringent and urgent grounds—only upon a conclusive showing of clear and present danger. This court has struck down, in case after case, state action, whether by ordinance or otherwise, which tends even to the slightest extent to impinge upon the absolute reach of freedom thus guaranteed. Freedom of speech and freedom of assembly stand precisely upon the same grounds as freedom of religion. State action, therefore, whether legislative or judicial, which imposes a burden, encumbrance, hazard or risk upon the free exercise of the right of lawful picketing and free assembly constitutionally guaranteed, will not by this court, we submit, be tolerated. Defendants, by trial and decision of California court, were deprived of constitutional due process (Fourteenth Amendment).

2. Defendants Were Convicted by Proof of Acts of Others, Not Proof of Their Own Acts

A most serious vice, as we conceive it, in this conviction thus sanctioned by the decision of the California Court, is that of imputing criminal liability to a particular defendant for the independent acts of another. Under the circumstances prevailing in the instant case, to permit vicarious liability to be constructively fastened upon these defendants and to authorize it substantively and procedurally in other similar cases—particularly those involving concerted economic action, strikes and peaceful picketing—is but to

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cance: *Marsh* v. *Alabama* (326 U. S. 501) and *Tucker* v. *Texas* (326 U. S. 517). In each case, this court protected the right of freedom of speech, even in circumstances where the speech in question had its inception in trespass.

introduce the thin sharp edge of the evil of "mass conviction". It is thoroughly to repudiate a concept to which Anglo-American jurisprudence clings—that of personal guilt and personal guilt only, guilt for personal conduct, immunity from guilt by the mere fact of presence or association. Nor would it do to say that this error was in anywise mitigated or cured by the court's instructions. The very fact that the court admitted testimony of the acts of others present, that it received in evidence exhibits—the very rocks—thrown at the parties named in the indictment by others, not these defendants, and crowned it all by submitting to the jury an instruction premised upon Penal Code 31, was enough to authorize and instruct the jury that it need not found its verdict upon a careful, discriminating assessment of the guilt of the defendants, if any, and their own particular acts, but that it might find a verdict against these particular defendants based upon the acts of any or all of the parties then present. This, in its essence, is the incipiency of "mass conviction".

Kotteakos v. *U. S.*, 328 U. S. 750; cf.

Bridges v. *Wixon*, 326 U. S. 135;

DeJonge v. *Oregon*, 299 U. S. 353;

Hague v. *C. I. O.*, 307 U. S. 496;

Townsend v. *Burke*, 334 U. S. 736, 92 L. Ed. (Adv.) 1231. (A case in which a conviction was condemned by this court upon the ground that the trial court had indulged in *assumption* as to an essential ingredient of the offense without requiring affirmative proof thereof);

Cole v. *Arkansas*, 68 S. Ct. 514, 33 U. S. 196;

Brown v. *Mississippi*, 297 U. S. 278, 80 L. Ed. 682;

Chambers v. *Florida*, 309 U. S. 227, 84 L. Ed. 724;

Lisenba v. *California*, 314 U. S. 219;

Ashcraft v. *Tennessee*, 322 U. S. 143, 64 S. Ct. 921; again, 327 U. S. 274, 66 S. Ct. 544;
Moore v. *Dempsey*, 261 U. S. 86, 67 L. Ed. 969;
White v. *Texas*, 310 U. S. 630, 84 L. Ed. 1342;
Glasser v. *U. S.*, 315 U. S. 827.

It is worthy to take special note of two or three of the foregoing cases.

In the *Kotteakos* case, the indictment in a single count charged defendants with a conspiracy to commit fraud in connection with obtaining loans or advances from the Federal Housing Administration. Although but one conspiracy was thus charged, the trial court allowed evidence of some seven or eight other conspiracies, all growing out of the same or related transactions, all cognate one to another, to go before the jury. This court set aside the conviction as fundamentally opposed to constitutional due process. Insisting upon the principle that, under our philosophy of law, conviction of crime can rest only on proof of personal guilt for acts personally committed, and pointing out the danger of mass convictions, the court significantly said:

> "Numbers are vitally important in trial, especially in criminal matters. Guilt with us remains individual and personal even as respects conspiracies. It is not a matter of mass application. • • • When many conspire, they invite mass trial by their conduct. Even so, the proceedings are exceptional to our tradition and call for use of every safeguard to individualize each defendant in his relation to the mass. • • • (The substantial right of the parties) in each instance was the right not to be tried *en masse* for the conglomeration of distinct and separate offenses committed by others."

And again:

> "Here, if anywhere, extraordinary precaution is required not only that instructions shall not mislead,

but that they shall scrupulously safeguard each defendant individually as far as possible from loss of identity in the mass."

The *Cole* case bears a very close analogy to our own. There again a conviction was set aside on the ground that it could not be permitted to rest upon evidence sufficient to prove guilt under one section of the statute where the defendant was charged under another section, though very closely related and perhaps included in the first. The case stands in bold outline for the simple basic principle that one may not be charged with committing a certain criminal act and be held guilty thereof by proof of commission of a different act.

We think it germane, too, to notice the *Glasser* case. This again was a charge of conspiracy against three defendants. One defendant was not present when certain conversations between the other two, alleged to be binding upon him, occurred. Notwithstanding the apparent conflict of interest between that defendant and the other two, the court compelled all three to go to trial under the legal representation of one attorney. Glasser, complaining of a deprivation of the essentials of due process, carried his conviction in the court below to this Court. This Court, recognizing even in the conspiracy case, the requirement that each is answerable only for his own acts, and not for the acts of others, set the conviction aside.

Due process of law, within the contemplation of the Fourteenth Amendment, we take to mean, among other things, the requirement that the accused shall be charged in an indictment and that he be given adequate information therein, with respect to the nature of the charge, and a fair trial, with an opportunity to meet the facts or acts specified by the indictment as the ingredient of the charge. We shall not pause here further to discuss the meaning or content

of the term "constitutional due process", for the question has so frequently been before this Court in recent years as to render an extensive discussion unnecessary and presumptuous.

Measured by the requirements of due process, these defendants did not have, in our judgment, a fair trial—a fair day in court, as that term is comprehended in Anglo-American law. They were charged in the indictment with having committed a certain act alleged to be constitutive of a crime. They were compelled upon the trial, however, to defend against evidence alleging them to have committed a wholly different act or acts of a totally different character. They were charged, in effect, with one thing; they were tried for another.

We do not here discuss the validity of a statute such as California Penal Code 31 when confined to its own intrinsic function. The statute was only intended to serve the purpose of subjecting a person to punishment as a principal where, *by due process of law,* he is proven to have aided and abetted the principal in commission of the crime charged. Nor are we concerned with the problem arising had the indictment charged the defendants with the commission of a statutory crime in the general, all-inclusive language of the statute. We may assume, *arguendo* at least, that so to charge them would in law be taken to mean a shorthand description of all of the methods by which the statute could be violated and to serve as notice thereof. But we are dealing with a vastly different situation. Here the defendants were charged with having committed a specific act—a specific series of acts. In each instance, the act was that of hurling a rock at a given named individual. The specificity with which the charge was described excludes necessarily any possible notice, any possible assumption that the defendant would have to come into court prepared to defend

against any other act than that specifically named. We would, therefore, have no quarrel at all with an indictment such as that before this Court in the case of *Moy* v. *U. S.* (254 U. S. 189), where the defendant was charged first in the terms of the statute, and then specifically with having committed certain acts constituting aiding and abetting. Such a charge obviously is compatible with the traditional elements of due process. Had the prosecution, however, in the instant case elected to hold defendants guilty or responsible for aiding and abetting, the indictment under which they here are charged and under which they here were compelled to stand trial falls far short of the requirements approved by this Court in *Moy* v. *U. S., supra.* It falls short, we submit, of the basic fundamental requirements prescribed as a minimum of due process in the Sixth Amendment.[14]

We have, we earnestly submit, a serious grievance within the compass of constitutional due process over a conviction in the state court, induced in large measure, if not entirely, by evidence that the particular crime with which these defendants were charged was, in fact, committed not by them but by others.

The error of which we complain in this case is graphically illustrated in the holding of the trial court overruling defendants' motion for an advisory verdict (motion for dismissal) as to those particular counts which, by the unanimous agreement of the District Attorney, defense counsel and the court, were wholly lacking in any evidence whatsoever. In fact, the District Attorney in open court con-

[14] The validity of our conclusion does not depend upon the premise that the Sixth Amendment is *per se* read into the due process clause of the Fourteenth. Its requirements, however, necessarily carry great weight and, when considered in conjunction with the impact of the requirements of the Fifth and First Amendments, upon the factual situation in this case are, we deem it, conclusive.

fessed the motion. (See petition, p. 14, *ante*). Had the trial court not labored under the assumption that mere presence alone was an incriminating circumstance, defendants' motion for a dismissal as to those counts would undoubtedly have prevailed. But the trial court, of its own motion, volunteered to inject for the first time as an issue in this case the factor of aiding and abetting under the authority of P. C. 31, and premised the propriety of doing so solely upon the fact of mere presence on the picket line when someone, unidentified, then present, committed one or more acts of violence. The flagrancy of this error becomes, we submit, *a fortiori* apparent when we have in mind that the indictment here did not charge a conspiracy. It charged solely an assault specifically described, "to wit, by throwing rocks". Proof thus radically varying and departing from acts thus charged falls squarely within the condemnation of this Court as expressed in *Cole* v. *Arkansas* (*supra*). That it offends, likewise, by attaching a presumption of guilt to the fact of mere presence alone, will be developed under our next topic.

3. California Court Denied Petitioners Their Constitutional Right to a Presumption of Innocence and Conversely Attached to Them a Presumption Either PRIMA FACIE or Conclusive of Guilt.

We need not urge the importance of preserving the integrity of the principle of the presumption of innocence, nor need we cite the authority of decisions of this Court holding that the presumption of innocence constitutes a vital component of constitutional due process. These defendants were charged with having committed an assault by throwing rocks at some nine different given and named persons. Let us have in mind the full connotation of the presumption of innocence in this context. Let us say that the

defendants threw a rock at one but not at the remaining persons named in the indictment. To make out each count, the prosecution would necessarily have to establish affirmative, substantive proof of assault by means of throwing a rock against each of the nine persons. Assuming—and we deny the premise—that it was competent for the prosecution to convict the defendants upon proof that they aided and abetted, in lieu of proof that they personally committed the acts specifically charged, yet nevertheless, the principle of the presumption of innocence would require the prosecution to establish substantive evidence of these defendants aiding and abetting the commission by third parties of each of the acts thus charged in each count of the indictment. Proof of one, which falls short of proof as to each count, would be entirely inadequate. Even upon this premise, the prosecution did no more than to rely, not upon proof that these defendants participated, aiding or abetting any third party in the commission of the particular acts charged, but solely upon the proof that they were present, hence *ex necessitate* implicated and *ipso facto* guilty of each of the acts committed by any of the parties present. This court, we believe, will readily appreciate that the presumption of innocence may not constitutionally be thus abrogated or corroded by erecting an *artificial presumption of guilt* to overcome it in this context, and, under a different set of facts, this court has not hesitated to strike down state action—in many cases legislative action—creating a *prima facie* presumption of guilt attached to the proof of a particular fact. We do not challenge the right of the state to render proof of one fact which intrinsically is inferentially probative of the existence of another fact *prima facie* evidence thereof. We are here, however, disputing the right of the state, whether legislatively or as here by judicial action, to render a fact which in and of itself is innocent of any criminal connotation, either a *prima facie* or a conclu-

sive inference of the commission of a different and a criminal act. It is fundamental to criminal jurisprudence that a circumstance, to be relied upon as an inference of guilt, must exclusively point to guilt and be irreconcilable with innocence. Mere presence, therefore, upon a picket line where thirty or forty are assembled to carry out a lawful, constitutional function, can not thus artificially be treated as an evidence or inference of guilt. Contrary to the prosecution's theory in this case, presence upon the picket line, where the picketing was neither charged nor proven to have been unlawful, can give rise to no inference or finding of guilt. To presume *mens rea* from an act itself intrinsically lawful is, at one stroke, totally to blot out the presumption of innocence.

We shall not here prolong this discussion. It does, in our judgment, touch deeply upon a principle of greatest importance in the field of current criminal jurisprudence. Should the writ in this case issue, we would undertake to submit ample authority for the position we here urge. For the purposes of this supporting brief, however, we deem it sufficient to call this court's attention to the following cases and the principles which they support:

Bailey v. *Alabama,* 219 U. S. 219, 55 L. Ed. 191, 31, S. Ct. 145;

Tot v. *United States,* 319 U. S. 463, 63 S. Ct. 1241;

Manley v. *Georgia,* 279 U. S. 1, 49 S. Ct. 215, 73 L. Ed. 575;

Morrison v. *California,* 291 U. S. 82, 54 S. Ct. 281, 78 L. Ed. 664;

McFarland v. *American Sugar Refining Co.,* 241 U. S. 79, 36 S. Ct. 498, 60 L. Ed. 899;

Mobile J. & K. C. R. Co. v. *Turnipseed,* 219 U. S. 35, 31 S. Ct. 136, 55 L. Ed. 78;

U. S. v. *Warden of Clinton Prison*, 29 Fed. Sup. 486, Aff'd C. C. A. 2d, 108 Fed. (2d) 861, Cert. denied, 309 U. S. 661, Rehearing denied, 309 U. S. 696;

Cf. *Heiner* v. *Donnan*, 285 U. S. 312, 76 L. Ed. 772.

Conclusion

Should the Legislature of the State of California pass an enactment providing that anyone present with a group on a picket line at a time when some member of the picket line indulges in an act of violence will be held *prima facie* (or conclusively) guilty of aiding and abetting in the commission of such act of violence, no one would doubt that such a statute would necessarily be condemned by the principles of constitutional due process. It would fall before the reasoning of this court in cases such as *Tot* v. *U. S.* (*supra*), *Murray* v. *Charleston* (*supra*), and a long line of similar decisions. Although the result here ensued not from legislative, but from judicial action, it is precisely analogous to the dilemma confronting these defendants upon their trial: Lip and token service was paid to the presumption of innocence, but the actual construction which the court extended to Penal Code 31 effectually served to deprive them of the benefit thereof.

Similarly, it would not be doubted that the Legislature of the State of California could not, consistently with constitutional due process, pass a statute permitting the prosecution to accuse a defendant with a crime by the commission of certain specific acts, and permit proof thereof upon trial by evidence of the commission of other and different acts; nor by proof that the defendant was present when someone else committed such acts. Such a statute would obviously likewise fall before all the traditional principles of constitutional due process.

Moreover, no one would suppose that the Legislature of the State of California possessed the power to render the right of a citizen to assemble upon the picket line conditional upon the subsequent event of whether or not some member of the picket line associated with him spontaneously or otherwise, commits an act of violence. Again, a violation of due process would be manifest.

These illustrations are by no means *reductio ad absurdum*. They are not fanciful. They are but a concrete application of the principles of constitutional law to the factual context of the instant case. They point up, in our judgment, the problem of due process which we submit as eminently worthy of the consideration of this honorable court.

Our advocacy here admittedly is on behalf of these instant petitioners, but we undertake respectfully to say that we are by no means concerned with a mere local or provincial issue. We conceive the problem here as broad and universal in its reach. It raises questions upon which, in our earnest judgment, this court may well pause and reflect. May we not consider that, as a result of conduct occurring among thirty of forty anonymous pickets engaged in what they conceived to be their legitimate and economic right to wage a labor dispute, these four defendant-petitioners—six in all, including the companion case of *Bundte and Phillips* v. *California*—find themselves singled out for a major prosecution and subjected to penitentiary sentences of nine counts of felony—54 counts in all. Is this not, indeed, a tremendous total of felony convictions to follow from what incipiently to many, if not all, of the participants seemed an obscure, spontaneous and isolated incident?

Have we not a right to urge that these men—men who have honorable records as hardworking, home-owning family men, stably rooted in their communities—be accorded every safeguard of due process vouchsafed them by the law of the land, before they are suddenly wrenched from their

environment and branded as felons? Have we not a right to insist that they be not so stigmatized by a pyramidal accumulation of acts and things done and said, not by them but by others; that they should not be swooped up into one vast dragnet made up of three rioting counts of misdemeanor and nine felony counts of deadly assault; made to stand trial on all of them jointly, charged with one set of specific acts but compelled to defend against the omnibus, nondescript acts of thirty or forty others present?

After all, these particular defendants are entitled to insist upon their full measure of constitutional protection, but it is not they alone who stand to suffer from the promulgation of the rule of law sanctioned by the decision of the California Court. If this aberration, as we conceive it, from those milestones of Anglo-American law which so notably differentiates our criminal jurisprudence from the methods of the police or totalitarian state, be not remedied, then there is ready at hand a precedent where citizens anywhere, in large numbers and in populous areas, may be subject to the loss of their liberty by the mere mechanism of establishing their presence and association with a group, itself legitimate, where and when some isolated or spontaneous acts of breach of the peace occur.

These are considerations which, in our judgment, warrant this court in granting a writ of certiorari.

Dated, San Francisco, March 18, 1949.

Respectfully submitted,

GEORGE E. FLOOD.

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APPENDIX I

(Vol. 87 A. C. A. 846)

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Criminal No. 2041

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent*

vs.

ROBERT MOORE, RICHARD MCCOARD, GEORGE SHERRAD (SHERRARD) AND JOE PIMENTEL, *Defendants and Appellants*

Opinion

Four defendants were jointly indicted, tried by a jury and convicted on one count for participating in a riot under Section 404 of the Penal Code, and, under Section 245 of that code, on several counts of assaults to do great bodily injuries by "throwing rocks" at different named persons. All defendants have appealed.

This is a companion suit with that of *People* v. *Bundte and Phillips* in which our opinion was this day filed, to which we refer for further particulars. Both cases grew out of a labor dispute which resulted in a strike and picketing of two adjacent lumber mills in Mendocino County. The affray which is here involved is the same as one which was included in the *Bundte* case, except that this case is against different pickets who participated in a general plan of assaulting non-union workmen with stones as they drove to the Richardson mill in their separate machines on February 4, 1947. The appellants' opening brief concedes that "defendants are admittedly members of a labor union and all the counts arose from alleged acts committed by defendants on picket lines in connection with a labor dispute between their union and certain redwood lumber companies in Mendocino County." Thirty or more pickets in a group met the non-union workmen as they drove their cars into the entrance to the Richardson Lumber Company mill about

8 o'clock in the morning, and hurled large rocks at each of them. All defendants were among the attacking strikers. Windshields and windows of the cars were broken, and the cars were otherwise damaged. Some of the drivers received serious injuries which required medical treatment. Some of the men identified the strikers who hurled the rocks at them. Other workmen identified the defendants as persons who participated in the affray and hurled rocks at particular drivers named in the several counts. In two or three instances the defendants were not identified as the particular strikers who actually threw the rocks at or who struck those drivers of cars.

All defendants were convicted of the first count of participating in a riot under Section 404 of the Penal Code, and of count three charging an assault on Schwartz. Moore and Sherrad were also convicted of counts four, six, seven and eight. Pimentel was also convicted of counts three, six and eight. All defendants were acquitted of counts nine and ten. The defendants Moore and Sherrad were sentenced on conviction of the first count to the county jail for 180 days. Moore and Sherrad were sentenced on each count of assault of which they were convicted to state prison for the term prescribed by law, said sentences to begin at the expiration of the county jail sentence, and to run concurrently. McCoard and Pimentel were sentenced on conviction of the first count of riot to pay a fine of $250 each, or to one day of imprisonment in the county jail for each two dollars of said fines remaining unpaid. They were further fined $300 on each of the other counts of which they were convicted, or to serve imprisonment in the county jail one day for each two dollars thereof which was unpaid, to commence at the expiration of the sentence for riot, the terms to run consecutively. Each defendant was released on bond pending the appeal.

The defendants demurred to the indictment on the ground that it did not conform to Sections 950, 951 and 952 of the Penal Code, and that felonies, to wit, assaults by means likely to result in great bodily injuries were united with the charge of a riot, which is a mere misdemeanor. The demurrer was overruled. That issue was determined in the previous *Bundte* trial.

The appellants also contend the court erred in overruling their motions for directed verdicts, to dismiss the indictment at the close of the prosecution's case, for a new trial and in arrest of judgment. It is also urged: That the court erred in refusing to strike out certain exhibits alleged to have been unsupported by the evidence, that certain counts failed for lack of evidence showing the particular defendant charged threw rocks at the individuals named therein, and that the court erred in giving to the jury an instruction based on Section 31 of the Penal Code.

The transcript contains over 900 pages of evidence. We are of the opinion the verdicts returned against the four defendants and the judgment of convictions are amply supported by the evidence. Both the riot charged and the assaults of which the defendants were convicted occurred at the Richardson mill at about 8 o'clock on the morning of the 4th day of February. The defendants and other associates had been previously picketing that mill for several weeks. The number of pickets previously engaged was greatly increased on that morning. They greatly outnumbered the non-union workers then engaged in the mill. At the time of the arrival of the workmen that morning, from 15 to 30 pickets had congregated on both sides of the roadway leading to the east entrance to the mill. Another group of pickets was stationed at another entrance to the mill. The evidence clearly indicates that the defendants and their striking associates were then engaged in a concerted plan to act together in the assaults and riot which occurred. The defendants were among them and active in the affray. As the non-union workmen, consisting of nine men separately mentioned in the various charges of assaults, namely, Pullen, Schwartz, Gibson, Jackson, Wise, Henderson, Mays, Tennison and Ray, drove their automobiles to one or the other of the two entrances to the mill, they were each stoned by the assembled pickets. The stones varied from the size of an egg to that of a cocoanut. Windshields and windows were broken, and the cars were otherwise damaged. Some of the drivers were struck by the rocks and seriously injured, requiring medical treatment. Some of the stones were found in certain cars and were identified and received

in evidence. Photographs of the cars were taken immediately afterward, showing the broken windows, and the dents in and damages to the cars. Those photographs were explained by witnesses and received in evidence after the foundation therefor had been adequately proved. After running the gantlet, the drivers of some of the non-union workmen's cars parked their machines and watched the stoning of other workmen as they entered the premises. Some of the drivers identified some of the pickets who threw stones at them. Two or three of them failed to identify the particular persons who threw stones at them. Other workmen who watched the stoning of the men supplied that evidence. Pat Gibson, who was hit in the head with a large rock and seriously injured, testified that he was met by a large group of picketers at the entrance, "more than there had been" before; that the defendant Moore said "there goes another one of them scab s-of-b's" and he threw a rock which broke Gibson's windshield and struck him; that Sherrad threw a rock which hit the back of his machine, and that Bundte and Phillips also hurled rocks at him. He said that Sherrad "called me a dirty —— —— scab bastard." Gibson said he parked his car near the mill and that, in company with another workman, he watched the stoning of other employees as they drove into the premises. He testified that he saw and identified each defendant, calling him by name, and also named other strikers who hurled rocks at Schwartz, Wise, Mays and Tennison. After the affray, Stanley Richardson, one of the mill owners, who was also stoned as he entered the premises just behind Mr. Schwartz, testified that he told the workmen to keep out of sight, and that he went out back of the mill and crept or walked through the brush a quarter of a mile to a neighbor's house and telephoned to Willits for an officer. The deputy sheriff, Reno Bartolomei, soon arrived. There was a dispute between the workmen and the strikers regarding the affray and about the damages to the machines. Gibson said that he then heard Moore and Sherrad say, "Bring the Sheriff's car around. We will do the same thing to them." Several of the strikers were pointed out to the officer by the drivers as among those who threw the rocks. The four defendants were so identified, and they were placed under arrest.

There is much argument in the briefs regarding the sufficiency of the identification of the four defendants as the particular ones who hurled rocks at each of the workmen charged by the indictment to have been assaulted. The defendants sought to impeach some of the witnesses in that regard by offering in evidence their testimony given at the former trial of Bundte and Phillips. We think the failure to mention all of these defendants in the Bundte case as having been seen to throw rocks is satisfactorily explained. These defendants were not charged with the offenses stated in the first indictment. We think the identification of the assailants in this case was satisfactorily established. Any discrepancy in the evidence of the two cases merely went to the weight of the evidence and credibility of the witnesses. Those were matters for the termination of the jury. Moreover, it does appear that the four defendants were acting together, and with their striking associates, to aid, abet and encourage all the strikers present to make the assaults and to commit the offenses charged. Under Section 31 of the Penal Code, the defendants were therefore principals in the commission of the offenses charged, whether they were actually identified as the particular individuals who hurled the rocks at each of the workmen.

We are of the opinion the court correctly instructed the jury substantially in the language of Section 31 that "all persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, * * * are principals in any crime so committed." (Penal Code, Sec. 31; People *v.* Bundte, — A. C. A. —). As we held in the last cited case, we are satisfied that section applies to the facts of this case.

The only effort to justify the assaults upon the workmen with stones was testified to by the defendant Robert Moore. He said that the strikers were engaged in picketing the mill premises on account of labor trouble, and that about fifteen of them were located at the eastern entrance to the mill; that when the first car arrived "we waved them down and told them there was a strike on and asked them if they couldn't see the picket line and to get out of there";

that the first car then turned around and left; that about twelve cars followed and four of them turned into the east entrance. In response to direct questions from defendant's counsel, Mr. Moore said they did not succeed in "flagging them down", and that the "third car tried to run over us. • • • Made a swipe towards us." He admitted that they threw rocks at the drivers of the cars who tried to run them down. But the evidence is very convincing that rocks were thrown at all the cars of workmen as they drove into the premises that morning. At least that question of defense was an issue for the determination of the jury. It was evidently decided adversely to the defendants.

The other defendants were called as witnesses, but none of them was asked any questions regarding the facts or circumstances of the offenses with which he was charged.

There was no variance between the allegations of the indictment and the proof adduced with relation to the acts, conduct or weapons used in committing the assaults or the riot. No weapons except rocks were used. The foundation for receiving in evidence the rocks found in the cars or in their immediate vicinity, the photographs of the rocks and of the damaged automobiles, was satisfactorily laid. The court, therefore, did not err in refusing to strike those exhibits from the record. The principles of law involved in cases under similar facts were fully discussed and determined in the Bundte case, which also included the same assaults which are involved in this case, except that those same acts were there charged against different named defendants.

On authority of the Bundte case, and the citations of law therein contained, we conclude that the court did not err in this action in overruling the demurrer to the indictment, or in denying defendants' motions for directed verdicts, for arrest of judgment, for a new trial, or to dismiss the indictment at the close of the prosecution's evidence.

We are convinced the defendants received a very fair and impartial trial. The jury was fairly and fully instructed on all material issues. We are satisfied there was no miscarriage of justice.

The judgment and the order denying a new trial are affirmed.

THOMPSON, *J.*

We concur:

ADAMS, *P. J.*;
PEEK, *J.*

Filed September 28, 1948, George N. Didion, Clerk.

APPENDIX II

IN THE DISTRICT COURT OF APPEAL, STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

3 Criminal No. 2041

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,*

vs.

ROBERT MOORE, RICHARD MCCOARD, GEORGE SHERRAD (SHERRARD) and JOE PIMENTEL, *Defendants and Appellants*

By the Court

On application for rehearing, it is ordered that the opinion of this court, filed on September 28, 1948, be modified by adding thereto on page 6 of the typewritten decision, after line 5 from the bottom, the following paragraph:

"There is no merit in appellants' contention that the court erred in denying their application for separate trials. Section 1098 of the Penal Code provides in part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.' It has been repeatedly held that a defendant so charged is not entitled as a matter of right to a separate trial. The question of the right to a severance of trial is addressed to the sound discretion of the trial court, with which decision we may not interfere, except upon a clear abuse of discretion. (*Peo-*

ple v. *Isby*, 30 Cal. 2d 879, 897; *People* v. *Goold*, 215 Cal. 763; 4 Cal. Jur., Ten-Year Supp. 718, sec. 268; 104 A.L.R. 1519, note)."

With the foregoing modification, the opinion, as filed, is approved, and the petition for rehearing is denied.

Filed October 13, 1948. George N. Didion, Clerk.

APPENDIX III

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

3 Criminal No. 2041

THE PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,*

vs.

ROBERT MOORE, RICHARD MCCOARD, GEORGE SHERRAD and JOE PIMENTEL, *Defendants and Appellants*

Appellants' petition for a hearing denied.
Carter, J., voting for hearing.

October 25, 1948.